File: (b) (6) – Kansas City, MO Date: MAR 16 2018

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jessica A. DeVader, Esquire

ON BEHALF OF DHS: Kimberly A. Burgess
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated April 4, 2017, denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Immigration Judge also granted the respondent voluntary departure. The Department of Homeland Security has filed a brief in support of the Immigration Judge's decision. The appeal will be dismissed.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2018). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found the respondent was convicted of a crime involving moral turpitude, family violence battery, under Ga. Code Ann., § 16-5-23.1(f) (2008), and, therefore, is ineligible for cancellation of removal. Section 240A(b)(1)(C) of the Act (precludes eligibility for those convicted of an offense under section 212(a)(2) of the Act, including a crime involving moral turpitude). On appeal, the respondent agrees with the Immigration Judge's holding that the statute in question is not divisible (Respondent's Br. at 1-2). He argues, however, that the statute is not a categorical crime involving moral turpitude as it includes acts that both do and do not involve moral turpitude. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994).

The statute at issue provides in pertinent part that:

> (a) A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another.
>
> (b) As used in this Code section, the term "visible bodily harm" means bodily harm capable of being perceived by a person other than the victim and may

> include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.
> . . .
>
> (f)(2) if the offense is committed between household members, it shall constitute the offense of family violence, it shall constitute the offense of family violence battery and be punished as follows. . . .

Ga. Code Ann. § 16-5-23.1 (2008). *See* IJ at 6; Respondent's Criminal History (unmarked exhibit).

The respondent's only argument on appeal is that "visible bodily harm" does not necessarily rise to the level of harm required to be a crime involving moral turpitude (CIMT). He argues the harm might be visible, but might not necessarily result in pain or serious physical harm.

The term 'moral turpitude' generally refers to conduct that is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Silva-Trevino,* 26 I&N Dec. 826, 833 (BIA 2016) (internal citation omitted). "To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state," including specific intent, knowledge, willfulness, or recklessness. *Matter of Silva-Trevino,* 26 I&N Dec. at 834; *see also Matter of Silva-Trevino,* 24 I&N Dec. 687, 689 n.1 (A.G. 2008).

Simple assault or battery is generally not considered to involve moral turpitude. However, where an assault or battery necessarily involves some aggravating factor that indicates the perpetrator's moral depravity, such a crime is properly found to involve moral turpitude. *See Matter of Ahortalejo-Guzman,* 25 I&N Dec. 465 (BIA 2011). In making this determination, we have looked at the level of intent of the perpetrator and other aggravating factors, including the class of victim and the degree of harm. *Matter of Sanudo,* 23 I&N Dec. 968, 973 (BIA 2006). A finding of moral turpitude, therefore, involves an assessment of both the state of mind and the level of harm inflicted. *Alonzo v. Lynch,* 821 F.3d 951, 959 (8th Cir. 2016); *Matter of Solon,* 24 I&N Dec. 239, 242 (BIA 2007). In addressing an Iowa assault statute, the United States Court of Appeals for the Eighth Circuit has noted that it is the intentional infliction of pain or injury that elevated portions of the statute from simple assault to a level that involves moral turpitude. *Alonzo v. Lynch,* 821 F.3d at 962-63; *see also Matter of Solon,* 24 I&N Dec. at 242 ("Intentional conduct resulting in a meaningful level of harm" has been found to involve moral turpitude).

We agree with the Immigration Judge that the intentional infliction of "visible bodily harm" is a CIMT (IJ at 5-7). Under Georgia law, the battery must result in pain or manifest harm to the victim. *Williams v. State*, 248 Ga. App. 316, 318, 546 S.E.2d 74, 78 (2001) (explaining difference in levels of harm between simple battery, battery, and aggravated battery); *Cox v. State,* 243 Ga. App. 582, 582, 532 S.E.2d 697, 698 (2000). A higher level of harm and intentional action is included in the statute, and is what differentiates it from simple battery under Ga. Code Ann., § 16-5-23. Simple battery, a separate crime, is more in keeping with the type of assaults involving non-consensual touching that we have found may, or may not, involve moral turpitude. *See Matter of Sanudo,* 23 I&N Dec. 968. Furthermore, "visible bodily harm" expressly includes "substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to

body parts." Ga. Code Ann., § 16-5-23.1. These sorts of injuries are indicative of "a meaningful level of harm" and, combined with intent, are sufficient to classify the crime as one involving moral turpitude. *Matter of Solon,* 24 I&N Dec. at 242.

On appeal, the DHS argues that the required aggravating factor is the familial relationship between the respondent and his victim (DHS Br. at 2-3). We agree that this relationship additionally supports finding that the crime involves moral turpitude, although the aforementioned factors alone are also enough to render it a CIMT. *See Alonzo v. Lynch,* 821 F.3d at 959 (noting moral turpitude is often found in assaults against people deserving of special protection), *quoting Matter of Sanudo,* 23 I&N Dec. at 971.

To conclude, we agree with the Immigration Judge that the respondent has been convicted of a CIMT and has not established his eligibility for cancellation of removal. Accordingly the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not

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apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

Ellen Rietbowitz
FOR THE BOARD